

**STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT**

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**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellee,

Supreme Ct. No: 157812

**vs**

**ARTHUR JEMISON,**

Defendant-Appellant.

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Wayne Circuit No. 15-10216-01  
Court of Appeals No. 334024

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**PLAINTIFF-APPELLEE'S ANSWER OPPOSING DEFENDANT'S  
APPLICATION FOR LEAVE TO APPEAL**

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**COUNTERSTATEMENT OF JURISDICTION**

The People concur with defendant's statement of appellate jurisdiction.

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

### I.

**Where a victim and defendant are strangers at the time he sexually assaults her, and the victim later meets the defendant and has consensual intercourse but has no idea he is her rapist, the rape shield statute precludes admission of the subsequent consensual sexual encounter. Here, the victim testified that she did not know defendant at the time of the incident that led to his conviction, but the two later met and engaged in consensual sexual relations prior to defendant ever being identified as her rapist. Did the trial court abuse its discretion in excluding evidence of the post-assault consensual sexual encounter because the rape shield statute precluded its admission?**

The trial court answered, "No."

The People answer, "No."

The defendant answers, "Yes."

### II.

**A defendant's right to face-to-face confrontation is not absolute, and can give way to necessity. Here, the trial court allowed an expert witness to testify from Utah, via Skype, but defendant was still able to view and cross-examine him. Was defendant's right to confrontation violated?**

The trial court answered, "No."

The People answer, "No."

The defendant answers, "Yes."

## COUNTERSTATEMENT OF FACTS

Defendant was charged with two counts of first-degree criminal sexual conduct.<sup>1</sup> Prior to trial, the prosecutor filed a notice under MCR 6.202, which permits the admission of laboratory reports in lieu of witness testimony. Under the court rule, unless the opposing party files a written objection to the notice within fourteen days of receipt, the reports are “admissible in evidence to the same effect as if the person who performed the analysis or examination had personally testified.”<sup>2</sup> Defendant’s trial counsel did not file a written objection pursuant to the rule. 5/20, 6; 5/25, 12.

Prior to trial, the prosecution filed a motion under MCL 750.520j<sup>3</sup> to exclude evidence of a consensual sexual encounter between the victim and defendant that occurred after the rape. On February 5, 2016, the parties argued the motion before Judge Dalton Roberson. The prosecutor argued that, because the victim and defendant did not know each other in 1996,<sup>4</sup> the exception to the rape shield statute would not apply. Further, the prosecutor argued, the evidence would be irrelevant and unfairly prejudicial to the victim. 2/5, 4. The defense argued that the evidence should be admitted because the issue of when the victim and defendant met and the nature of their relationship

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<sup>1</sup>MCL 750.520b.

<sup>2</sup>MCR 6.202.

<sup>3</sup>MCL 750.520j states the following: (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.  
(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

<sup>4</sup>It is uncontested that the parties did not meet until the year 2000, and that at the time of the consensual sexual encounter, the victim did not know that defendant was her rapist.



was “what this case is all about.” 2/5, 5. At several points during the proceedings, the judge seemed not to understand that the sexual assault occurred *before* the victim and defendant had even met.<sup>5</sup> The court at first denied the prosecutor’s motion, but then after further discussion and argument on the record, decided to withhold its ruling in order to allow the defense to file a written response to the prosecution’s motion. 2/5, 9-13. On February 19, 2016, Judge Roberson issued an order granting the prosecutor’s motion to exclude the evidence.<sup>6</sup>

At another pretrial motion hearing on May 20, 2016, the trial court addressed the notice filed by the prosecution regarding the use of laboratory reports in lieu of testimony. The prosecutor informed the court that she was seeking to admit two laboratory reports pursuant to MCR 6.202. Instead of calling the authors of these reports to testify, the prosecutor was seeking to have one expert, Catherine Maggert, testify to her conclusions regarding the two reports as well as her conclusions regarding her own report. 5/20, 5-12. The defense objected to the prosecutor being allowed to admit the lab reports in lieu of testimony, citing MRE 703.<sup>7</sup> Judge Antonio Viviano ruled that the reports could be admitted without expert testimony. 5/20, 10. At the hearing, the prosecutor also sought to admit the testimony of a DNA expert, Derek Cutler, via video conferencing. The

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<sup>5</sup>For example, the trial court stated: “Well, let me ask you this: Her identification is based on the fact that she had this previous sexual encounter with him.” 2/5, 6. Later, after the prosecutor clearly explained that the consensual encounter happened later, and that the victim did not even know defendant at the time of the assault, the court then stated: “The sexual encounter--the consensual sex came first, right?” 2/5, 8.

<sup>6</sup>The order is attached to defendant’s brief.

<sup>7</sup>MRE 703 provides: “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible.”

defense objected on confrontation grounds. 5/20, 13. Judge Viviano ruled that Cutler could testify via video conferencing. 5/20, 14. Lastly, the prosecution sought to add an additional chain and custody witness, David Dehem, to her witness list. There was no objection by the defense, and Judge Viviano allowed the addition of the witness. 5/20, 14-15.

Judge Lawrence Talon presided over defendant's trial. At trial, the victim, Talisha Sams Dowe, testified that on September 14, 1996, she was working as a dancer when she encountered a man by the name of Delano. She knew of him from the neighborhood. 5/24, 43-44. He asked her for a dance, and she danced for him. After the dance, he asked her if she wanted to go out for breakfast and she said yes. They left the club together. 5/24, 46. Instead of going out to eat, they ended up changing plans and going to Delano's cousin's house, where they had consensual intercourse. 5/24, 47. Afterwards, Dowe asked Delano to take her home. He said he had to make a stop first. He drove to a street called Weyher in the city of Detroit. 5/24, 49.

Delano left the car running on Weyher Street while he got out and went into a house. He was gone for approximately thirty minutes, while Dowe waited in the car. 5/24, 50. Eventually, Delano came out and got back in the car. He drove to a house at the end of the block and again left the car running while he went into the house. 5/24, 51. Dowe was still waiting in the car when she observed a man walking through the alley that drew her attention. The man was wearing a baseball cap, tan jacket, striped shirt, and light colored blue jeans. The man walked in front of the car and touched the car with his finger. Then, he opened the driver's side door and put a gun between Dowe's legs. He threatened to shoot her and demanded her money. 5/24, 54-55.

The man proceeded to put the car in drive and he drove to Belvedere Street. There, he pulled over and forced Dowe to perform fellatio followed by vaginal intercourse. 5/24, 57-62. The gun

was still in his hand. 5/24, 59. After she was raped, Dowe handed over her jewelry and money. 5/24, 62-63. She was then able to get dressed and exit the vehicle. All the while, the man was still holding the gun in his hand. She walked to her friend Ebony's house. While she was there, she got into a fight with two of Ebony's friends and ended up with a black eye. Eventually, she went to the home she shared with her grandmother. 5/24, 64-65-69. When she got home, she rinsed her mouth out with peroxide and took a shower. 5/24, 69. Her sister came over and they took a cab to the police department. 5/24, 71. The police took her to the hospital. 5/24, 72. The victim told police that her black eye was caused by defendant during the assault. 5/25, 114. She did not tell police that she was forced to perform fellatio. 5/25, 114.

A rape kit was performed at Detroit Receiving Hospital on September 14, 1996. 5/24, 12, 20-25, 73-74. In 2015, the victim was contacted by Detective Mike Sabo about her unsolved rape case. 5/24, 83-84. Detective Sabo told her that her rape kit had been tested and asked her to look at some pictures. The victim was not able to identify defendant when his photo was shown in a photographic lineup, but when she was shown a single photo of defendant, she was able to identify him. She had met defendant in the year 2000 and she knew him as her niece's uncle. Her sister, Andrea Sams, had two children with defendant's brother. The victim met defendant because of the relationship between his brother and her sister. The victim saw defendant "a few times" in the year 2000. She did not know him when he raped her in 1996. The victim also identified defendant in the courtroom. 5/24, 85-90, 94, 139-140, 203, 205; 5/26, 40-41..

Detroit Police Sergeant David Dehem testified that he had been assigned to Property Control for the past five years. His responsibility was to supervise the officers who handled the intake and distribution of evidence. There was a tracking system for logging the evidence. The system was not

in place in 1996, but all of the records from the previous tracking system were downloaded into the new system. He was able to locate the victim's rape kit using the evidence tag number associated with her kit. 5/24, 149, 153-154. The evidence tag showed that the victim's kit was received from Detroit Receiving Hospital on September 17, 1996. It was checked into the property room on September 18, 1996. He did not know where the kit was between the date the victim was raped, September 14, 1996, and the date the kit was received from the hospital, which was September 17, 1996. The evidence tag on the rape kit indicated that Sergeant Flora Humphrey picked up the kit from the hospital and transferred it to Investigator Howard Brown, who then transferred the kit to the property room. 5/25, 138-139. The box had been sealed by a Nurse Fisher. 5/25, 139. The victim's rape kit was not removed from the property section until December 10, 2013, when it was sent to Sorenson Forensics for testing. 5/24, 154, 156-157. Nobody had access to the property room except for property control police officers. 5/24, 152, 155.

The defense objected to Dehem being allowed to testify to the actions of Humphrey, Brown, and Fisher. The prosecutor again argued that deficiencies in the chain of custody go to the weight, not the admissibility, of the evidence. The defense again argued that the threshold foundational requirement had not been met. The objection was overruled. 5/25, 140-143.

After Dehem testified, the prosecutor proceeded to call forensic scientist Catherine Maggert so that she could testify to the laboratory reports pursuant to Judge Viviano's order. 5/25, 12. The defense objected, on the basis that there had been no chain of custody established as to who handled the evidence at the hospital, who gave it to the police, or who placed it in the property room at the Detroit Police Department. 5/25, 12-15. The prosecutor argued that chain of custody evidence does not have to be perfect, and that any breaks in the chain would go to the weight, not the admissibility,

of the evidence. The defense argued that there still has to be a foundation laid, and that the prosecutor had failed to establish even the foundational requirement for admissibility. The court reserved ruling on the chain of custody issue, but allowed the prosecution to call Maggert. 5/25, 12-40.

Maggert testified that she was employed as a DNA analyst with the Michigan State Police Crime Lab in Northville, Michigan. 5/25, 42. She was qualified as an expert in serology, forensic biology, and DNA analysis. 5/25, 51. She proceeded to testify to a report authored by Derek Cutler, a forensic DNA analyst at Sorenson Forensics. 5/25, 63. Her role with this particular report was to conduct a technical review of the male DNA profile that had been developed, and to enter the sample into the CODIS database. 5/25, 64-72. Maggert also testified to a report authored by Joshua Strong from the Michigan State Police CODIS Unit. The report identified defendant as a suspect based on the DNA profile that Maggert had entered into CODIS. 5/25, 74-75. Lastly, Maggert testified that she obtained a known buccal swab from defendant and submitted it for DNA testing. Forensic Scientist Erica Caster developed a DNA profile from the buccal swab, and Maggert compared it to the profile that had been developed by Sorenson Forensics. Maggert concluded that defendant's DNA was present on the victim's vaginal swab and genital gauze samples. Maggert then placed her findings in a report. 5/25, 79-99.

The prosecution then proceeded to call Derek Cutler via video conferencing, pursuant to Judge Viviano's order. The defense again placed an objection on the record. Judge Talon overruled the objection, noting for the record that he could not overrule Judge Viviano: "If I was deciding this I would not allow the testimony in, but Judge Viviano has already decided and I can't overrule him." 5/26, 3-7.

Cutler testified that he was employed as a forensic DNA analyst at Sorenson Forensics in Salt Lake City, Utah. 5/26, 10. He was qualified as an expert in DNA analysis over defense counsel's objection. 5/26, 18. Cutler testified regarding the male DNA profile that he developed from the victim's vaginal swabs. 5/26, 25-28.

Defendant was convicted of one count of first-degree criminal sexual conduct. 5/31, 7. He was sentenced to twenty-two to forty years imprisonment. 6/22, 30.

Defendant appealed his conviction to the Court of Appeals, and on April 12, 2018, Judges Sawyer, Hoekstra, and Murray unanimously affirmed his conviction.<sup>8</sup> Judge Murray wrote separately but concurred with the majority.<sup>9</sup> Defendant has now filed an application for leave to appeal before this Court.

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<sup>8</sup>See *People v Jemison*, unpublished majority opinion, COA #334024 (April 12, 2018) (Attached as Appendix A).

<sup>9</sup>See *People v Jemison*, unpublished concurring opinion, COA #334024 (April 12, 2018) (Attached as Appendix B).

## ARGUMENT

### I.

**Where a victim and defendant are strangers at the time he sexually assaults her, and the victim later meets the defendant and has consensual intercourse but has no idea he is her rapist, the rape shield statute precludes admission of the subsequent consensual sexual encounter. Here, the victim testified that she did not know defendant at the time of the incident that led to his conviction, but the two later met and engaged in consensual sexual relations prior to defendant ever being identified as her rapist. The trial court did not abuse its discretion in excluding evidence of the post-assault consensual sexual encounter, because the rape shield statute precluded its admission.**

#### Standard of Review

Generally, a trial court's decision on whether to admit or exclude evidence is reviewed for an *abuse of discretion*, however, when the trial court's decision involves a question of law, such as whether the admission of evidence is precluded by statute, *de novo* review applies.<sup>10</sup>

Constitutional claims are reviewed *de novo*.<sup>11</sup> Generally, in the case of a preserved constitutional error, the beneficiary of the error is required to prove that the error was harmless beyond a reasonable doubt.<sup>12</sup>

Where a defendant preserves a constitutional claim as it relates to the exclusion of evidence pursuant to the rape shield statute, the defendant has the initial burden of proof to show that a constitutional error in fact occurred. First, the defendant must make an offer of proof as to how the evidence is relevant to his claim. Once the defendant satisfies this initial showing, the trial court

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<sup>10</sup>*Detroit v Detroit Plaza Ltd. Partnership*, 273 Mich App 260, 275-276 (2006).

<sup>11</sup>*People v Duenaz*, 306 Mich App 85, 90 (2014).

<sup>12</sup>*People v Anderson (After Remand)*, 446 Mich 392, 521 (1994).

should hold an in camera review to determine whether the evidence would violate the defendant's constitutional rights:

If there is a sufficient offer of proof as to a defendant's constitutional right..., as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an in camera evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy or humiliate sexual assault victims and to guard against mere fishing expeditions. Moreover, the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues or misleading the jury. We again emphasize that in ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant's prior sexual conduct...unless that ruling would unduly infringe on the defendant's constitutional right to confrontation.<sup>13</sup>

Therefore, this Court should review defendant's constitutional claims for an *abuse of discretion*.

## Discussion

The trial court did not abuse its discretion in excluding evidence of the victim's *post-assault*, consensual sexual encounter with defendant, because admission of the evidence was precluded under the rape shield statute. The rape shield statute provides:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g1 unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

- (a) Evidence of the victim's past sexual conduct with the actor.
- (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.<sup>14</sup>

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<sup>13</sup>*People v Hackett*, 421 Mich 338, 349-351 (1984) (internal citations omitted).

<sup>14</sup>MCL 750.520j.



“[The rape shield statute] bars, with two narrow exceptions, evidence of *all* sexual activity by the complainant not incident to the alleged rape.”<sup>15</sup> “[T]he Legislature, by the use of the term ‘unless and only to the extent that’ in the rape-shield statute, expressly limited admission of such evidence to what is necessary for the defense. Therefore, the trial court appropriately should limit the scope of sexual conduct evidence where constitutionally possible.”<sup>16</sup>

At the time of its enactment, the rape shield statute was “grounded in the evidentiary principle of balancing probative value against the dangers of unfair prejudice, inflammatory testimony, and misleading the jurors to improper issues.”<sup>17</sup> The Legislature’s intent in enacting the statute was to protect victims from undue embarrassment over their sexual past and to encourage victims to participate in prosecution without fear of having their sexual history exposed.<sup>18</sup> Generally speaking, where the victim’s alleged conduct involves a third party, the law favors exclusion of the evidence. On the other hand, where the alleged conduct involves the defendant, courts determine admissibility on a case-by-case basis.<sup>19</sup>

Here, defendant argues that the evidence should have been admitted under subsection (1)(a), of the statute, as evidence of the victim’s past sexual conduct with the actor. The term “past” as it is used in the statute has been interpreted to encompass any sexual conduct occurring prior to the

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<sup>15</sup>*People v Adair*, 452 Mich 473, 478 (1996), quoting *People v Stull*, 127 Mich App 14, 17 (1983) (emphasis in original).

<sup>16</sup>*Id* at 487.

<sup>17</sup>*Id* at 483.

<sup>18</sup>*Id* at 480-481.

<sup>19</sup>*Id* at 483.

introduction of the evidence at trial.<sup>20</sup> Thus, it includes conduct such as that which occurred here, where a consensual encounter happens after the assault but prior to trial. But the inquiry as to admissibility does not end there. The evidence must be material to a fact at issue and its probative value must not be outweighed by unfair prejudice.<sup>21</sup>

The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation.<sup>22</sup>

Defendant relies on *People v Adair*, and argues that the trial court failed to conduct the proper analysis in determining whether the evidence was admissible under the statute. *People v Adair* involves a marital relationship where the parties engaged in consensual relations subsequent to an alleged assault. *Adair* discusses the factors to be considered by a trial court when deciding whether such evidence is more probative than prejudicial. One such factor is timing:

On a common-sense level, a trial court could find that the closer in time to the alleged sexual assault that the complainant engaged in subsequent consensual sexual relations with her alleged assailant, the stronger the argument would be that if indeed she had been sexually assaulted, she would not have consented to sexual relations with him in the immediate aftermath of sexual assault.<sup>23</sup>

Another factor to be considered is whether the victim had a “personal relationship” with defendant prior to the alleged assault. If so, then evidence of a subsequent sexual assault would potentially become more probative “than if the two had been living together in a long-term marital

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<sup>20</sup>*Id* at 483.

<sup>21</sup>MCL 750.520j(1); *Id* at 485.

<sup>22</sup>*Hackett, supra*, at 349.

<sup>23</sup>*Adair, supra*, at 486-487.

relationship.” On the other hand, if the parties are married to each other at the time of the alleged assault, and then subsequently engage in consensual relations, a trial court could also find that evidence of the subsequent act would be overly inflammatory and misleading to the jury: “[T]he trial court could find that there may be other human emotions intertwined with the relationship that may have interceded, leading to consensual sexual relations in spite of an earlier sexual assault.”<sup>24</sup>

Defendant argues that *Adair* applies here because he did not have a “personal relationship” with the victim at the time of her assault. But, unlike the parties in *Adair*, defendant did not even know the victim at the time she was assaulted. Any probative value that the evidence would have is dependant on whether the parties even knew each other at the time of the alleged assault. In its Opinion, the Court of Appeals noted the following:

Defendant bases his claim on *Adair*, 452 Mich at 453. However, the facts of *Adair* involve marital rape, and thus, *Adair*’s analysis presupposes that the defendant’s identity is known to the victim. Comparatively, defendant’s case is somewhat unusual because the victim’s knowledge of defendant’s identity in 1996 is contested. The victim stated that she did not know defendant in 1996, and the prosecution introduced evidence to support that fact, including her own testimony, and testimony from her sister, who stated that the victim did not meet defendant prior to the year 2000. Additionally, the victim testified that she was unaware of her attacker’s identity until she was shown a picture of defendant in 2015 and realized that she recognized him as her niece’s uncle. The victim did not know defendant was her rapist until police informed her that defendant’s DNA had been matched to the DNA found in her rape kit. Evidence that the victim and defendant had consensual sex in 2000, four years after she was sexually assaulted, does not resolve the question whether she knew defendant in 1996, which is ultimately at issue herein. Without further evidence to establish that the victim knew defendant in 1996, the fact that she and defendant had sex in 2000 is not sufficiently probative to show that she knew his identity in 1996, and by extension, that she could have had consensual sex with him.<sup>25</sup>

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<sup>24</sup>*Id* at 487.

<sup>25</sup>*Jemison*, unpub op at 3.

Defendant has not presented any evidence to refute the victim's testimony that the two did not meet until the year 2000. If the victim and defendant did not know each other at the time of the alleged assault, and the victim did not even know he was her rapist when she later engaged in consensual sex with him, then the evidence of the subsequent sexual encounter is not probative of consent. If the victim had known that defendant was her rapist, she would not have engaged in the consensual act at all. This case is nothing like *Adair*, where the parties were married during both the consensual and nonconsensual acts. Therefore, the evidence that the victim consented to the subsequent act is not probative of whether she consented in 1996. The consensual act may as well have been with a stranger. This is exactly the type of evidence that the rape shield statute was intended to preclude. Introducing this evidence would have been highly prejudicial and would have confused the jury. Therefore, the trial court did not abuse its discretion in admitting the evidence and the Court of Appeals' decision to exclude the evidence was correct.

Defendant also argues that the exclusion of the evidence infringed upon his constitutional right to confront the witnesses against him and to present a defense. A defendant's right to cross-examine witnesses is not unlimited. For example, there is no right to cross-examine on irrelevant matters.<sup>26</sup> "[The right to confrontation] may [also] bow to accommodate other legitimate interests in the criminal trial process and other social interests."<sup>27</sup> While it is true that in some circumstances the exclusion of evidence pursuant to the rape shield statute could infringe on a defendant's constitutional right to confrontation, such instances are rare. The rape shield statute itself represents

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<sup>26</sup>*People v Arenda*, 416 Mich 1, 8 (1982).

<sup>27</sup>*Id* at 8.

a legislative determination that, “in most cases, such evidence is irrelevant.”<sup>28</sup> In *People v Arenda*, the Michigan Supreme Court examined the issue of whether the exclusion of evidence pursuant to the rape shield statute violated the defendant’s right to confrontation. The Court held that, “Given the minimal relevance of such evidence in most cases, the prohibitions do not deny or significantly diminish [the] defendant’s right of confrontation.”<sup>29</sup>

A defendant alleging a denial of his constitutional rights based on the exclusion of evidence under the rape shield statute has the initial burden to prove that the evidence is relevant.<sup>30</sup> In the context of rape shield evidence, once a defendant provides an offer of proof as to how the proposed evidence is relevant for the purpose it is being offered (i.e. defendant’s right to confrontation or to present a defense), then the trial court should conduct an in camera review in order to determine the merits of the defendant’s arguments. The Michigan Supreme Court has held that a hearing held outside the presence of the jury effectively protects both the victim’s right to privacy and the defendant’s constitutional rights.<sup>31</sup>

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<sup>28</sup>*Id* at 10.

<sup>29</sup>*Id* at 11.

<sup>30</sup>*Hackett, supra*, at 350.

<sup>31</sup>Subsection (2) of the rape shield statute provides: “If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). See MCL 750.520j(2). In *Hackett, supra*, the Michigan Supreme Court considered whether the in camera review procedure should apply to when a defendant’s confrontation rights have been implicated, and decided that the in camera procedure would best accomplish the required balancing of interests, and would also serve to create a record for appellate review. Further, the Court stated

Here, defendant asserts that the alleged error was preserved when the defense objected to the exclusion of the evidence,<sup>32</sup> and that the burden is now on the People to prove that the error was harmless beyond a reasonable doubt. Assuming that defendant has preserved the constitutional claim through his objection at the motion hearing on February 5, 2016, he still has to show that there was error in the first place. Here, the trial court effectively carried out the in camera review at the motion hearing, as the hearing was held outside the presence of the jury. Further, the record from the hearing is sufficient for appellate review. The trial court presumably balanced both sides' interests and found that the evidence should be excluded. For the reasons stated already, there was simply no error. Even if defendant's theory of the case was that the victim consented in 1996, the evidence of the subsequent sexual encounter does not make it more likely that she consented in 1996. Defendant was still free to present a consent defense, but the evidence in question is not probative of the material issue of consent. Therefore, there was no constitutional error and the Court of Appeals' decision was correct.

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that even where a trial court fails to conduct an in camera hearing, remand was not necessary as long as the existing record was sufficient for purposes of appellate review. See *Hackett, supra*, at 349-351.

<sup>32</sup>At the motion hearing on February 5, 2016, the defense argued that the evidence should be admitted because "this is a case here where who knew who when and what the relationship was is what this case is all about." 2/5, 5. Now on appeal, defendant argues that the objection was sufficient to preserve the constitutional claim, because it was "a practical expression of the right to present a defense."

## II.

**A defendant's right to face-to-face confrontation is not absolute, and can give way to necessity. Here, the trial court allowed an expert witness to testify from Utah, via Skype, but defendant was still able to view and cross-examine him. Defendant's right to confrontation was not violated.**

### Standard of Review

This Court reviews a lower court's interpretation of a court rule *de novo*.<sup>33</sup> "Because a trial court may use two-way interactive video technology to take testimony from a person at another location...the decision to do so is reviewed for an *abuse of discretion*."<sup>34</sup> "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes."<sup>35</sup>

The constitutional claim of whether a defendant has been denied his constitutional right to confrontation is reviewed *de novo*.<sup>36</sup> This issue is preserved.

### Discussion

Defendant claims that his constitutional right to confront the witnesses against him was violated when the trial court allowed Cutler, an expert witness, to testify via video conferencing despite counsel's objection. MCR 6.006 governs video testimony at trial, and states that in order for a witness to be able to testify remotely at trial, three requirements must be met: (1) the defendant must be present in the courtroom or else must waive his presence; (2) there must be a showing of

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<sup>33</sup>*People v Lacalamita*, 286 Mich App 467, 472 (2009).

<sup>34</sup>*People v Buie*, 491 Mich 294, 319-320 (2012) (internal citation and quotation omitted).

<sup>35</sup>*Id* at 320.

<sup>36</sup>*People v Benton*, 294 Mich App 191, 195 (2011).

good cause; and (3) the parties must consent. The rule further states that a nonconsenting party does not need to provide a reason for not consenting.<sup>37</sup>

The Confrontation Clause consists of four requirements:

(1) a face-to-face meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor.<sup>38</sup>

“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”<sup>39</sup> While face-to-face testimony is preferable, it is not indispensable. Rather, it “must occasionally give way to considerations of public policy and the necessities of the case.”<sup>40</sup>

Here, the trial court did not have the consent of both parties, yet still allowed Cutler to testify via Skype. While this could be viewed as an *abuse of discretion*, the Court of Appeals correctly found that it did not violate defendant’s right to confront Cutler and was therefore harmless. The Court of Appeals noted that the trial court was in compliance with three of the four requirements of the Confrontation Clause, as the witness testified under oath, the jury and defendant were able to observe him, and defendant was still able to cross-examine him while he testified. As to the face-to-face requirement, the Court of Appeals acknowledged that this requirement is not

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<sup>37</sup>MCR 6.006(C).

<sup>38</sup>*People v Pesquera*, 244 Mich App 305, 309 (2001) (internal citation omitted).

<sup>39</sup>*Maryland v Craig*, 497 US 836, 845 (1990).

<sup>40</sup>*Id* at 849-850, quoting *Mattox v United States*, 156 US 237, 243 (1895).



absolute. Rather, the trial court was required to make a case-specific finding as to why it was necessary to dispense with the requirement.<sup>41</sup> The trial court did so, when it stated on the record:

[U]sually a lay witness it's very difficult having a video, but of an expert witness where all emotions are gone, that is admissible.

\* \* \*

Anything that has to be shown to [the expert witness] can be shown to him. They have the different electronic devices [to aid] in passing [the evidence] back and forth.<sup>42</sup> 5/20, 14.

The Court of Appeals found that the trial court's decision to allow testimony by Skype was appropriate because the expert would be testifying in real time, and defendant would be able to view him and cross-examine him as he was testifying.<sup>43</sup> The Court of Appeals noted that Cutler would have had to travel from Salt Lake City, Utah and was merely testifying to a report indicating that he had processed the victim's rape kit and found male DNA. His testimony did not link defendant to the victim's kit. Defendant was later identified through a CODIS hit, and the prosecution called Maggert to testify as to how defendant came to be a suspect.<sup>44</sup> 5/25, 42-99.

While the trial court's noncompliance with MCR 6.006 was error, it did not infringe upon defendant's confrontation rights. Therefore, the error was harmless beyond a reasonable doubt. The Court of Appeals' decision was correct, and this Court should deny defendant's application for leave to appeal.

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<sup>41</sup>*Jemison*, unpub op at 5.

<sup>42</sup>*Id* at 6.

<sup>43</sup>*Id* at 5-6.

<sup>44</sup>*Id* at 6-7.

**RELIEF**

WHEREFORE, the People request this Honorable Court to deny defendant's application for leave to appeal.

Respectfully submitted,

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AMS/ms